

REMARKS/ARGUMENTS

Pending claims 1-11 and 16-24 remain rejected under 35 U.S.C. §102(e) as being anticipated by the Sherburne reference (i.e., U.S. Publication No. 2004/0243866). Applicant respectfully traverses the rejection and respectfully requests reconsideration of the same. In this regard, Sherburne is not a valid prior art reference under 35 U.S.C. §102(e), at least because to the extent that the Examiner contends that Sherburne teaches the claimed subject matter, this subject matter was invented by Applicant prior to the filing date of Sherburne. Accordingly, Sherburne does not qualify as a prior art reference under §102(e).

As evidence that Sherburne was filed after the invention of the subject matter by Applicant, reference is made to U.S. Publication No. 2002/0128037 (the '411 application), which has a filing date of March 9, 2001 (prior to the priority date of Sherburne) and names the Applicant as sole inventor. FIGS. 1 and 2 of the '411 application and the corresponding specification substantially correspond to that disclosed in FIGS. 5 and 6 and the corresponding specification of Sherburne.

Accordingly, because Applicant invented the subject matter in Sherburne cited by the Examiner, and did so prior to the priority date of Sherburne (i.e., March 21, 2001), Sherburne is not useable as prior art under §102(e) as it was not "filed in the United States before the invention by the applicant for patent..." 35 U.S.C. §102(e).

In any event, the rejection over Sherburne is further overcome in light of the 37 C.F.R. §1.132 Declaration filed by Applicant (*see* Reply to Office Action Mailed June 21, 2005). In this Declaration the Applicant stated his conception and/or invention of the subject matter of Sherburne cited by the Examiner. *See* Exhibit A of Reply to Office Action. This unequivocal statement in the Declaration must be accepted as establishing inventorship by Applicant. MPEP §716.10 ("An uncontradicted 'unequivocal statement' from the applicant regarding the subject matter disclosed in an article, patent, or published application will be accepted as establishing inventorship") (emphasis added).

Furthermore, the situation here is exactly the situation contemplated for use of a Rule 132 Declaration:

The following examples demonstrate the application of an attribution affidavit or declaration. ... Example 2 same facts as above [i.e., reference filed less than one year before application], but the author or patentee is an entity different from applicant. Since the entities are different, the reference is prior art under 35 U.S.C. 102(a) or 102(e). In the situation described in Example 2, an affidavit under 37 C.F.R. 1.132 may be submitted to show that the relevant portions of the reference originated with or were obtained from applicant. Thus the affidavit attempts to convert the fact situation from that described in Example 2 to the situation described in Example 1.

MPEP §716.10. This is exactly the purpose of the Declaration that Applicant filed in connection with the previous Reply to Office Action. Thus there is no requirement that Applicant be "the assignee or co-inventor" of the prior reference as contended by the Examiner. Office Action, p. 2.

Furthermore, the Rule 132 Declaration is to be considered by the Examiner, as evidence of Applicant's prior invention is to be considered whatever its form:

When the 102(e) reference patentee got knowledge of the applicant's invention from him, as by being associated with him, or, as here, had knowledge of the joint applicants' invention by being one of them, and thereafter describes it, he necessarily files the application after the applicant's invention date and the patent as a "reference" does not evidence that the invention, when made, was already known to others. Evidence of such a state of facts, whatever its form, must be considered.

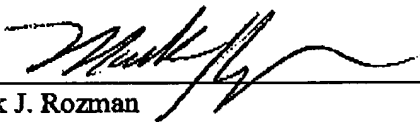
In re Land, 151 U.S.P.Q. 621 (C.C.P.A. 1966) (emphasis added).

Accordingly, the Sherburne reference is not useable as prior art under §102(e), as clear evidence of Applicant's prior invention has been established, and thus Applicant respectfully requests reconsideration of the rejection.

In view of these remarks, the application is now in condition for allowance and the Examiner's prompt action in accordance therewith is respectfully requested. The Commissioner is authorized to charge any additional fees or credit any overpayment to Deposit Account No. 20-1504.

Respectfully submitted,

Date: February 23, 2006


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